

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 9, 2007

**IN THE MATTER OF G.M.H. and R.S.H.**

**Appeal from the Juvenile Court for Overton County**  
**No. 365-401-A     John Officer, Judge**

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**No. M2006-02665-COA-R3-PT - Filed on May 24, 2007**

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The termination of father's parental rights for abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(iv) and for incarceration for more than ten years under § 36-1-113(g)(6) is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court**  
**Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Daryl A. Colson, Livingston, Tennessee, for the appellant, D. H.

Robert E. Cooper, Jr., Attorney General and Reporter, Douglas Earl Dimond, Senior Counsel, for the appellee, Tennessee Department of Children's Services.

**OPINION**

The trial court terminated Father's parental rights to his children G.M.H. (born in 1998) and R.S.H. (born in 1999) for abandonment under two statutory grounds. First, the trial court found Father abandoned his children under Tenn. Code Ann. § 36-1-102(1)(A)(iv) since he was incarcerated for the four (4) month period prior to the filing of the Petition for Termination of Parental Rights and he engaged in conduct prior to his incarceration that exhibited a wanton disregard for the welfare of his children. Second, the trial court found the ground in Tenn. Code Ann. § 36-1-113(g)(6) existed since Father was incarcerated under a sentence of more than ten years when both children were under eight years of age. In addition to proving the grounds by clear and convincing evidence, the trial court also found the Department of Children's Services ("DCS") proved termination of Father's parental rights was in the children's best interest by the same standard.

The children were born to the marriage of Father and their mother. The children were removed from their Father's custody in 2002<sup>1</sup> and placed in their mother's custody. On April 22, 2002, Father was convicted of child rape for having sexually abused his ten year old stepdaughter. Father signed a written confession and pled guilty to the offense, whereupon Father was sentenced to eighteen years imprisonment.

The children were in state custody for 2003 and three-quarters of 2004. In August of 2004, the trial court placed the children back with their mother and imposed restrictions on the mother. She was ordered to live with her mother and was not to allow the children to have contact with Father. In March of 2005, the children were removed from their mother's custody and placed in DCS custody due to dependency and neglect since she violated the court's August 2004 order by leaving her mother's home and taking the children to visit the Father in jail as well as allowing telephone contact "thus placing the children at imminent risk." The children's mother has since surrendered her parental rights.

On September 21, 2005, DCS filed a petition to terminate Father's parental rights. The petition alleged termination was warranted on four (4) separate grounds: (1) abandonment under Tenn. Code Ann. § 36-1-113(g)(1), as defined in Tenn. Code Ann. § 36-1-102(1)(A)(iv), by engaging in conduct prior to his incarceration that exhibited wanton disregard for the children's welfare; (2) a prior judicial finding of severe child abuse under Tenn. Code Ann. § 36-1-113(g)(4); (3) being sentenced to more than four years incarceration for abuse of the children's half sibling under Tenn. Code Ann. § 36-1-113(g)(5); and (4) being sentenced to more than ten years imprisonment when the children were under eight years of age as set out in Tenn. Code Ann. § 36-1-113(g)(6). A hearing was held on DCS's petition on January 25, 2006, where Father was present and represented by counsel. A certified copy of Father's conviction papers and a copy of Father's signed confession describing the rape and sexual abuse were introduced into evidence.

The trial court heard testimony from the DCS case manager. The case manager testified that the children have no emotional relationship with Father since they had been separated from him for several years. The case manager explained that the children needed permanency, and she believed they could be placed in an adoptive home.

Father testified at the hearing. Father denied the child rape occurred and argued that his confession was coerced. He admitted, however, that his signature was on each page of the confession. While it is not necessary to recite the specifics, Father's confession admitted to having sexual relations with a ten year old child fifteen to twenty times over a course of four months.

The trial court found that two grounds had been proved by clear and convincing evidence: (1) that Father had abandoned his children under Tenn. Code Ann. § 36-1-102(1)(A)(iv) by pre-incarceration conduct showing wanton disregard for their welfare and (2) his sentence and the

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<sup>1</sup>DCS initiated proceedings for child abuse, and the juvenile court found the children neglected and dependent and that Father had committed severe child abuse of the children's half-sibling. That order was not appealed.

children's age under Tenn. Code Ann. § 36-1-113(g)(6). The court also found that it was in the children's best interest that his parental rights be terminated. Father appealed.

## **I. STANDARD FOR TERMINATION OF PARENTAL RIGHTS**

A court may terminate a person's parental rights only if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The higher evidentiary standard, as well as procedural safeguards, exist to prevent unwarranted government interference with a parent's fundamental and constitutionally protected right to the care and custody of his or her children. To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

## **II. INCARCERATION AS GROUND**

Tennessee Code Annotated § 36-1-113(g)(6) provides in pertinent part as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court;

It is undisputed that Father has been incarcerated by order of a court under a sentence of eighteen years for a criminal offense and that both children were under eight years of age at the time. There is no question that the requirements of this statutory ground are satisfied.

## **III. ABANDONMENT UNDER TENN. CODE ANN. § 36-1-102(1)(A)(iv)**

Tennessee Code Annotated § 36-1-102(1)(A)(iv) provides in pertinent part as follows:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

...

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has

been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child . . . .

This statute requires that the party seeking termination establish certain criteria about incarceration and the parent's behavior before incarceration. Father began serving his eighteen year sentence in May of 2002 and was imprisoned during the four months preceding the filing of the petition in September 2005. Father's incarceration clearly meets the incarceration criterion of Tenn. Code Ann. § 36-1-102(1)(A)(iv).

In addition to incarceration, Tennessee Code Annotated § 36-1-102(1)(A)(iv) also requires specific pre-incarceration conduct by the parent in order to justify termination. Under the relevant provision, the parent must have engaged "in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child." The trial court found that Father's sexual relations with a ten year old stepdaughter exhibited "wanton disregard for the welfare" of Father's children. We agree.

On appeal, Father argues that since there was no evidence he had harmed the children subject to the petition, then there was no "wanton disregard" of them. The sexual abuse of Father's stepdaughter, the children's stepsister, is sufficient to exhibit wanton disregard for their welfare.<sup>2</sup>

#### **IV. BEST INTERESTS**

After grounds have been established by clear and convincing evidence, it must also be shown by clear and convincing evidence that termination of the parent's rights is in the child's best interest. This determination is governed by Tenn. Code Ann. § 36-1-113(i) which provides as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

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<sup>2</sup>We note that a separate ground for termination is that the parent has been found by a court to have committed severe child abuse, including sexual abuse, against the child who is the subject of the termination petition or "any sibling or half-sibling" of that child or any other child residing in the parent's home. Tenn. Code Ann. § 36-1-113(g)(4).

- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The trial court found that DCS proved by clear and convincing evidence that it was in the children's best interest to terminate Father's parental rights based upon the following findings:

- 1. [Father] has not made an adjustment of circumstances, conduct or conditions so as to make it safe and in the children's best interest to be in the home of the parent. [Father's] sentence precludes a relationship developing between him and his children during their formative years.
- 2. [Father] has not maintained regular visitation or contact with the children and the Juvenile Court of Overton County, Tennessee specifically ordered on September 10, 2004 that he was no longer to be allowed phone contact with said children.
- 3. [Father] has no meaningful relationship with said children.
- 4. [Father] has shown brutality and sexual abuse toward his stepdaughter, J.; he engaged in sexual acts with J. during January 2001.
- 5. Said children are young and in need of parents and a permanent home through adoption.

Considering the statutory criteria, the record, and the standard of proof, we affirm the trial court's finding that there is clear and convincing evidence that it is in the children's best interest that Father's parental rights be terminated.

**V.**

The trial court is affirmed. Cost of this appeal are taxed to the Tennessee Department of Children's Services.

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PATRICIA J. COTTRELL, JUDGE